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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

POM WONDERFUL LLC, a Delaware limited liability corporation,

Plaintiff,

vs.

THE COCA COLA COMPANY, a Delaware corporation; and DOES 1 through 100,

Defendant.

Case No. CV08-06237 SJO (MJWx)

Hon. S. James Otero

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT RE: DEFENDANT'S AFFIRMATIVE DEFENSE OF UNCLEAN HANDS; MEMORANDUM OF POINTS AND AUTHORITIES

[Statement of Uncontroverted Facts and Conclusions of Law and Declaration of and Brooke S. Hammond filed concurrently; [Proposed] Order lodged concurrently]

Judge: Hon. S. James Otero
Date: January 19, 2016
Time: 10:00 a.m.
Place: Courtroom 1 — 2nd Floor
312 N. Spring Street

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 19, 2016, at 10:00 a.m. or as soon thereafter as this matter may be heard, in Courtroom 1 – 2nd Floor of the United States District Court for the Central District of California, 312 North Spring Street, Los Angeles, California, before the Honorable S. James Otero, United States District Judge, Plaintiff POM Wonderful LLC ("POM") will and hereby does move pursuant to Fed. R. Civ. P. 56 for partial summary judgment on Defendant The Coca-Cola Company's ("Coca-Cola") Thirty-Fourth Affirmative Defense (Unclean Hands), as alleged in Coca-Cola's Answer to the First Amended Complaint with respect to that aspect of the defense based on POM's health claim advertising and alleged misrepresentations that its juices are not from concentrate. [Dkt. No. 70].

This Motion is made on the grounds that Coca-Cola cannot raise a genuine issue of material fact sufficient for a trial on these unclean hands defenses, and POM is entitled to partial summary judgment as a matter of law, on the following grounds:

(1) **<u>On the Issue of POM's Alleged Health Claim Advertising</u>**

Partial summary judgment should be granted in favor of POM to strike and/or preclude application of Coca-Cola's unclean hands defense that POM's health claim advertising is "not supported by any substantial scientific evidence" because:

(a) As a matter of law, the issue of POM's health claim advertising does not "directly relate" to the immediate controversy at issue, i.e., whether Coca-Cola deceives consumers into believing its pomegranate blueberry juice product primarily contains pomegranate and blueberry juice and/or that there are significant amounts of pomegranate and blueberry juice in its product;

(b) As a matter of law, Coca-Coca cannot meet its burden to raise a triable issue that POM's health benefit advertising was literally false or misleading under the Lanham Act (and under its unclean hands defense), including based on a "lack of substantiation" standard, which is only available under the Federal Trade Commission Act (or similar statutes) and reserved exclusively for the government and prosecuting authorities, not private litigants; and

(c) Coca-Cola cannot raise a triable issue, including under the heightened evidentiary standards for unclean hands defenses, which require a showing of clear and convincing evidence to defeat summary judgment, that POM's alleged health claims advertising is: (i) affirmatively false or misleading; and (ii) sufficiently egregious to support the application of unclean hands.

(2) **On the Issue of POM's Alleged Misrepresentations Regarding "From Concentrate" In Its Advertising**

Partial summary judgment should be granted in favor of POM to strike and/or preclude application of Coca-Cola's unclean hands defense based on the allegation that POM misleads consumers into believing its juices are not "from concentrate":

(a) As a matter of law, the issue of how POM manufactures and advertises its juice, whether as "freshly squeezed" or "from concentrate," is not "directly related" to the immediate controversy at issue, i.e., whether Coca-Cola deceives consumers into believing its pomegranate blueberry juice product primarily contains pomegranate and blueberry juice and/or that there are

significant amounts of pomegranate and blueberry juice in its product;

(b) Coca-Cola cannot raise a triable issue, including under the heightened evidentiary standards for unclean hands defenses, which require a showing of clear and convincing evidence to defeat summary judgment, that POM's representations regarding the nature of its juice products ("fresh squeezed" or not "from concentrate") are: (i) false or misleading; and (ii) sufficiently egregious to support the application of unclean hands.

(3) Regardless, as a matter of law, public policy precludes the application of Coca-Cola's unclean hands defense when weighed against Coca-Cola's alleged misconduct in this case.

This Motion is supported by this notice of motion and motion, the attached memorandum of points and authorities, the concurrently filed Declaration of Brooke S. Hammond, the concurrently filed Statement of Uncontroverted Facts and Conclusions of Law, the [Proposed] Order lodged herewith, such additional evidence and argument as may be presented at the hearing on this Motion, all of the pleadings, files and records in this proceeding, and such other evidence as may later be submitted.

The Motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on November 2, 2015.

DATED: December 1, 2015 ROLL LAW GROUP PC

By: /s/ Kristina M. Diaz
Kristina M. Diaz
Attorneys for Plaintiff
POM WONDERFUL LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

FEDERAL STATUTES

OTHER AUTHORITIES

RULES

TREATISES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In its Thirty-Fourth Affirmative Defense, Defendant The Coca-Cola Company ("Coca-Cola") seeks application of the equitable defense of unclean hands to escape liability for its own misconduct (i.e. falsely advertising that its Minute Maid® pomegranate blueberry 100% juice blend ("Pomegranate Blueberry Juice") primarily contains pomegranate and blueberry juice when it only contains less than 1% of these juices) by accusing Plaintiff POM Wonderful LLC ("POM") of also falsely advertising its own juice products. Specifically, Coca-Cola alleges that POM: (1) gave the false impression that its juices were "fresh-squeezed" and not "from concentrate" and (2) made "health claims" about its pomegranate products that were allegedly "not supported by substantial scientific evidence." See Answer at pp. 12:21-13:10 [Dkt. No. 70].

In asserting these defenses, Coca-Cola is trying to accomplish at least two things for trial of this matter: the admission into evidence of irrelevant but highly prejudicial matters relating to POM's ongoing dispute with the Federal Trade Commission ("FTC"), as well as some pathway to subsume this trial against Coca-Cola with a trial on POM's health advertising.[1]

Regardless of Coca-Cola's obvious motives, the Court can and should grant partial summary judgment in favor of POM and preclude Coca-Cola from presenting evidence on these unclean hands defenses on several grounds, each of which are independently sufficient to warrant summary judgment.

First, and most obvious, the purported misconduct cited by Coca-Cola is not "directly related" to the conduct at issue in this matter and as asserted in POM's First Amended Complaint ("FAC"). POM neither alleges that: (1) Coca-Cola misrepresents the health benefits of its Pomegranate Blueberry Juice, nor; (2)

[1] Coca-Cola's allegation about "from concentrate" also targets POM's advertising.

misleads consumers into believing that its product is "fresh-squeezed" and not "from concentrate." The alleged wrongdoings relied upon by Coca-Cola do not in any way relate, let alone "directly relate," to the central issue of dispute in this case-- the actual content or amount of pomegranate or blueberry juice in Coca-Cola's competing product. That direct relationship between any unclean hands defense and the plaintiff's underlying claims, however, is required and is not present here. See, e.g., Pom Wonderful LLC v. Welch Foods, Inc., 737 F. Supp. 2d 1105, 1113 (C.D. Cal. 2010) (rejecting unclean hands defense in false advertising case where defendant claimed plaintiff's product was "from concentrate" and not "fresh squeezed" because such conduct did not directly relate to dispute regarding amount of pomegranate juice in product at issue); Fuddruckers, Inc. v. Doc's B.R. Others, Inc., 826 F.2d 837, 847 (9th Cir. 1987) (rejecting unclean hands defense in trade dress claim against copycat restaurant where defendant claimed plaintiff falsely described its hamburger meat as "ground steak").

Second, even assuming Coca-Cola's allegations are sufficiently related to POM's claims, which they are not, Coca-Cola certainly cannot satisfy the heightened legal standard for the application of any unclean hands defense, i.e. because ***the defense is very disfavored.*** In fact, ***"courts are reluctant to apply the unclean hands doctrine in all but the most egregious situations***." U-Haul Int'l, Inc. v. Jartran, Inc., 522 F. Supp. 1238, 1255 (D.C. Ariz. 1981), aff'd, 681 F.2d 1159 (9th Cir. 1982).

Thus, to avoid summary judgment, Coca-Cola must demonstrate with "clear, convincing evidence" that POM's conduct was not only inequitable and directly related to POM's claim against Coca-Cola, but egregious as well.[2] Coca-Cola,

[2] TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 834 (9th Cir. 2011); accord Pfizer, Inc. v. International Rectifier Corp., 685 F.2d 357, 369 (9th Cir. 1982) ("only a showing of wrongfulness, willfulness, bad faith, or gross negligence, proved by clear and convincing evidence, will establish sufficient culpability for invocation of

however, has no clear and convincing evidence sufficient to raise a triable issue that POM engaged in any misconduct or that its advertising was untrue, deceptive (or inequitable), and sufficiently "egregious" (severe and harmful to consumers, to Coca-Cola, etc) to warrant the application of the unclean hands defense.[3]

Nor can Coca-Cola satisfy its heavy burden in opposing this Motion by relying on the FTC's "lack of substantiation" legal standard, which allows the FTC, but not private plaintiffs, to measure the "sufficiency" of the science behind a given health claim. While both the government and private plaintiffs may each bring actions for false or misleading advertising, only prosecuting authorities (unlike private plaintiffs) have the power to challenge a health claim based on the "sufficiency" of the science (by quality or amount, for example) to support a given claim.[4] Thus, to meet its burden as a private plaintiff (and especially so given the

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the doctrine of unclean hands."); Welch Foods, 737 F. Supp. 2d at 1113 (defendant required to submit "clear and convincing" evidence to prevail on unclean hands defense on summary judgment); Revolution Eyewear, Inc. v. Aspex Eyewear, Inc., 2008 WL 6873811, at *5 (C.D. Cal. Jan. 3, 2008) (same); Tube Forgings of America, Inc. v. Weldbend Corp., 788 F. Supp. 1150, 1153 (D. Or. 1992) (summary judgment granted against defendant's unclean hands defense where defendant failed to come forward with "clear and convincing" evidence of plaintiff's misconduct).

[3] In Welch Foods, on facts almost identical to these, the Court held that Welch's failure to demonstrate the existence or extent of harm caused by POM's deception precludes a finding that it would be inequitable for POM to proceed on its claims. 737 F. Supp. 2d at 1113. Citing the Ninth Circuit, the Court explained, " [T]he extent of actual harm caused by the conduct in question, either to the defendant or to the public interest, is a highly relevant consideration [in applying the unclean hands defense]. Id. (citing Republic Molding Corp. v. B. W. Photo Utilities, 319 F. 2d 347, 349-350 (9th Cir. 1963)).

[4] See, e.g., National Council Against Health Fraud, Inc. v. King Bio Pharm., Inc., 107 Cal.App.4th 1336, 1342 (2003) ("Prosecuting authorities, not private plaintiffs, have the administrative power to request advertisers to substantiate advertising claims before bringing action for false advertisement[.]") In contrast, private plaintiffs "have the burden of proving that advertising is actually false or misleading." Bronson v. Johnson & Johnson, Inc., 2013 WL 162191, at *8 (N.D.

"egregious" standard), Coca-Cola must show, at a minimum, that POM's health claims are literally false.[5] But it cannot do so. That would require, at a minimum, expert opinion that it does not have here, including scientific studies on POM products that purport to affirmatively disprove the claims made. Indeed, a "substantiation" type analysis on the "character" of the 100 plus studies supporting POM's claims would not only require an extensive mini-trial in this case, but such an analysis would also be entirely irrelevant to this dispute between private parties.

Last, Coca-Cola also cannot present clear and convincing evidence in support of its unclean hands defense based on alleged false impressions by POM in its advertising that its juices are not "from concentrate" (again assuming for argument's sake only that such a defense can be "directly related" to POM's claims). There is no dispute that the "from concentrate" language is on every bottle of POM's juice.

For these reasons and those set forth below, POM is entitled to partial summary judgment against Coca-Cola's Thirty-Fourth Affirmative Defense.

II. FACTUAL BACKGROUND

A. The False And Misleading Packaging For Coca-Cola's Pomegranate Blueberry Juice

POM initiated this action against Coca-Cola on September 22, 2008, alleging three causes of action associated with Coca-Cola's sales of the Pomegranate

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Cal. April 16, 2013), citing King Bio, 107 Cal.App.4th at 1344-45.

[5] Indeed, private plaintiffs can only meet their burden by adducing affirmative evidence of the falsity of an advertising claim. Johns v. Bayer, WL 1498965, at *36 (S.D. Cal. April 10, 2013) (granting summary judgment because "in the absence of affirmative evidence that scientific research did not support the prostate cancer claim from December 2008 until May 31, 2010, the strength of Bayer's evidence is irrelevant and Plaintiffs' claims are based on lack of substantiation rather than proof of falsity."); Fraker v. Bayer Corp., 2009 WL 5865687, at * 8 (E.D. Cal. Oct. 6, 2009) (requiring plaintiffs to "adduce evidence sufficient to present to a jury to show that Defendant's advertising claims with respect to the Product are actually false; not simply they are not backed up by scientific evidence").

Blueberry Juice: (1) False Advertising under Section 43 of the Lanham Act, 15 U.S.C. §1125(a), (2) False Advertising under Section 17500 of California Business and Professions Code, and (3) Statutory Unfair Competition under Sections 17200 et. seq. of the California Business and Professions Code. [Dkt. No. 1]. POM filed its FAC on July 27, 2009, alleging the same three causes of action. [Dkt. No. 53].

The essence of the allegations in the FAC is that the packaging of Coca-Cola's Pomegranate Blueberry Juice is false and misleading. See FAC, ¶¶ 17-23 [Dkt. No. 53]. POM alleges although the name of the product contains the words "pomegranate" and "blueberry" and the label depicts pomegranates and blueberries, the actual product contains virtually no pomegranate or blueberry juices. Id. Rather, it is comprised of just 0.3% pomegranate juice, 0.2% blueberry juice, with 0.1% raspberry juice added. See POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228, 2235, 189 L. Ed. 2d 141 (2014). In direct contrast to Coca-Cola's Pomegranate Blueberry Juice name and label, 99.4% of the product is really apple and grape juices. Id.

B. The Allegations Of Coca-Cola's Unclean Hands Defense

Coca-Cola filed its Answer on September 30, 2009 and asserted an affirmative defense of unclean hands. See Answer at pp. 12-13 [Dkt. No. 70]. To support its unclean hands defense, Coca-Cola alleges, in part, that POM engaged in the following conduct:

- POM's name, label, advertisements, website and promotions give the false impression that its pomegranate juice products are "fresh squeezed" and not "from concentrate";

- POM's advertisements and promotions tout "health claims" about its pomegranate juice products that are not supported by "substantial scientific evidence" and, thus, POM seeks to

> capitalize on the fruits of its own misconduct in the form of misleading labeling and advertising.

Answer at pp. 12:27-13:7 [Dkt. 70].

POM now seeks partial summary judgment as to these aspects of Coca-Cola's unclean hands defense.

III. APPLICABLE LEGAL STANDARDS

A. Legal Standard For Summary Judgment

"Rule 56 provides for summary judgment on particular issues or claims." O'Toole v. Northrop Grumman Corp., 305 F.3d 1222, 1227 (10th Cir. 2002). The motion can be used to dispose of all ***or part*** of the opposing party's claims or defenses (so-called "partial summary judgment"). Fed. R. Civ. Proc. 56(a). For example, partial summary judgment can dispose of claims or defenses having no factual support, as well as those in which the facts are undisputed, or which turn solely on issues of law. See Schneider v. TRW, Inc., 938 F2d 986, 991 (9th Cir. 1991) (claim for relief not recognized by law). "A partial summary (judgment)... seems particularly appropriate" to test affirmative defenses. Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2737 (3rd ed. 2002); see also Hutchison v. Pfeil, 105 F.3d 562, 564 (10th Cir. 1997). ("A [party] may use a motion for summary judgment to test an affirmative defense which entitles that party to judgment as a matter of law.") (internal quotations omitted).

A moving party on summary judgment may carry its burden either by (1) negating an essential element of the opposing party's claim or defense or (2) showing the opposing party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial. Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc. 210 F3d 1099, 1102 (9th Cir. 2000); Celotex Corp. v. Catrett, 477 US 317, 325 (1986).

Moreover, ***where the opposing party's claims are subject to a heightened***

evidentiary standard (e.g., "clear and convincing evidence"), the motion may be based on lack of evidence meeting this heightened standard. Anderson v. Liberty Lobby, Inc., 477 US 242, 254 (1986) (holding no "genuine issue" exists where the evidence presented in opposing affidavits is "of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence"); In re First Alliance Mortg. Co. 471 F3d 977, 998-999 (9th Cir. 2006) (holding no clear and convincing evidence for punitive damages).

B. Legal Standard For Raising A Triable Issue On The Defense Of Unclean Hands Is A Direct Relationship To Plaintiff's Claims, And "Clear and Convincing" Evidence Of Egregiousness Misconduct

Because the defense is disfavored, "courts are reluctant to apply the unclean hands doctrine in all but the most egregious situations." U-Haul Int'l , 522 F. Supp. at 1255. "As the party with the burden of persuasion at trial" on the affirmative defense of unclean hands, Coca-Cola "must establish beyond controversy every essential element of its" claim for relief. Southern California Gas Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003).

Therefore, to avoid summary judgment on its unclean defense, Coca-Cola must present "clear, convincing evidence" in support of every element of its claims. Welch Foods, Inc., 737 F. Supp. 2d at 1113 ("clear and convincing" standard required for unclean hands); Tube Forgings of America, Inc., 788 F. Supp. at 1153 (summary judgment granted against defendant's unclean hands defense where defendant failed to come forward with "clear and convincing" evidence of plaintiff's misconduct and noting general disfavor of defense).

Applying these legal principles to the facts here, to raise a "triable issue" sufficient to warrant a trial on its unclean hand defense, Coca- Cola must present clear and convincing evidence of POM's alleged misconduct, its relatedness to POM's claims, ***as well as the egregiousness of the alleged misconduct.*** Id. see also Pfizer, Inc., 685 F.2d at 369 ("We have stated that only a showing of wrongfulness,

willfulness, bad faith, or gross negligence, proved by clear and convincing evidence, will establish sufficient culpability for invocation of the doctrine of unclean hands."); Fuddruckers, 826 F.2d at 847.

C. The "Egregious" Standard Weighs Heavily Against Coca-Cola

Coca-Cola's burden of proof is high. A defendant asserting an unclean hands defense must introduce "clear, convincing evidence of egregious misconduct." Citizens Fin. Group, Inc. v. Citizens Nat. Bank of Evans City, 383 F.3d 110, 129 (3d Cir. 2004) (internal quotations omitted). "Egregious misconduct" can take the form of "fraud, unconscionability, or bad faith on the part of the plaintiff." S & R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 377 n. 7 (3d. Cir. 1992); Sanofi–Aventis v. Advancis Pharm. Corp., 453 F. Supp. 2d 834, 856–857 (D. Del. 2006) (rejecting the "unclean hands" defense and holding that although defendant put forth some evidence that plaintiffs may have had a competitive purpose in filing the action, "clear, convincing and unequivocal evidence" of "egregious" conduct was lacking).

Coca-Cola must make some showing of actual harm. In addition, Coca-Cola's failure to demonstrate the existence or extent of harm caused by POM's deception precludes a finding that it would be inequitable for POM to proceed on its claims. As the Ninth Circuit has explained,

> [T]he extent of actual harm caused by the conduct in question, either to the defendant or to the public interest, is a highly relevant consideration [in applying the unclean hands defense] [citation omitted]. In patent cases a patent owner who has misused his patents in a manner contrary to the public interest is not denied relief in enforcing his patent rights if he can demonstrate that the consequences of misuses have been dissipated or 'purged.' [citation omitted] In trade-mark cases involving 'unclean hands' as a defense 'the courts will carefully weigh

whether the representation actually leads to deception ***' [citation omitted].

Republic Molding Corp., 319 F.2d, at 349-350; accord Citizens Fin. Group, Inc., 383 F.3d at 129.

IV. COCA-COLA CANNOT RAISE A TRIABLE ISSUE IN SUPPORT OF ITS UNCLEAN HANDS DEFENSE REGARDING POM'S HEALTH CLAIMS

A. Coca-Cola's Health Claims Defense Does Not Directly Relate To POM's Claims

To establish an unclean hands defense, the alleged conduct must "directly relate" or be in "immediate and necessary relation" to the alleged misconduct for which plaintiff seeks relief. Welch Foods, 737 F. Supp. 2d at 1111; Fuddruckers, 826 F.2d at 847; Specialty Minerals, Inc. v. Pluess-Staufer AG, 395 F. Supp. 2d 109, 112-13 (S.D.N.Y. 2005) (rejecting unclean hands defense in patent infringement case where alleged conduct involved different patent at issue and was not directly related to plaintiff's use or acquisition of the patent); Campagnolo S.R.L. v. Full Speed Ahead, Inc., 258 F.R.D. 663, 666 (W.D. Wash. 2009) (rejecting unclean hands defense in false advertising case where defendant's claim that plaintiff misrepresented the weight of its own cranksets did not directly relate to plaintiff's allegations that defendant misrepresented the weight of plaintiff's cranksets in advertising).

To assert a viable unclean hands defense, it is not enough for the conduct just to be factually similar. Welch Foods, 737 F. Supp. 2d at 1110. In Welch Foods, a case involving nearly identical Lanham Act claims by POM against another competitor, the defendant sought to assert an unclean hands defense by arguing that POM deceived consumers by: (1) as asserted here, obscuring the term "from concentrate" on bottles and in its advertising; (2) failing to disclose water as an ingredient in its juice; and (3) similar to here, suggesting POM's juice was "fresh

squeezed" from "tree to bottle" without any manufacturing steps. Id. at 1010-1011. The Court, however, rejected defendant's unclean defense as to these claims finding them too "broad" and "not directly related to Pom's claims that Welch misleads consumers into believing that its juice blend contains more pomegranate juice than it actually does by including the word "pomegranate" in the name and prominently depicting a pomegranate in the label." Id. at 1011.

Coca-Cola's assertion that "Plaintiff's health claims are not supported by any substantial scientific evidence" do not even come close to the type of conduct POM complains of, i.e. the lack of pomegranate and blueberry juice in Coca-Cola's product or any misrepresentation regarding the amount of any particular component or ingredient. Compare FAC, ¶¶ 17-23 [Dkt. No. 53] with Answer at p. 13:6-7 [Dkt. No. 70]. Instead, as discussed below, Coca-Cola's alleged "wrongs" or "consumer deception" committed by POM are, as in Welch Foods, "premised on a different deception, different factual allegations, and different types of advertisements." Welch Foods, 737 F. Supp. 2d at 1111.

At best, Coca-Cola's allegations regarding POM's health claim advertising relate only to the nutritional value or benefits of POM's juice, not the actual content of the juice, the predominant juices (pomegranate and blueberry) constituting the product or any other ingredients present in the juice. Moreover, in the FAC, POM does not challenge as part of its case any of Coca-Cola's advertising that suggests that Coca-Cola's Pomegranate Blueberry Juice provides certain health benefits. See [Dkt. No. 53]. Coca-Cola's effort to apply the unclean hands defense based on POM's health claims advertising is nothing more than a red herring and cannot, as a matter of law, serve as the basis for Coca-Cola's application of unclean hands.

B. Coca-Cola Lacks Clear and Convincing Evidence Of Egregious Misconduct In Connection With POM's Health Claim Advertising

Even assuming this unclean hands defense is "directly related" (and it is not),

POM is also entitled to partial summary judgment because Coca-Cola lacks clear and convincing evidence of egregious misconduct to support its affirmative defense of unclean hands based on POM's health advertising. On summary judgment, POM need only point out "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp., 477 U.S. at 325. Coca-Cola, as the non-moving party, must then "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e). Mere allegations or denials are insufficient and do not defeat a moving party's allegations. Id.; Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250, 1258 (9th Cir. 1982) (concluding that "Overland's ... unclean hands defense [was] not carefully considered ... but merely makeweight arguments introduced in a futile attempt to forestall summary judgment."); Coleman v. ESPN, Inc., 764 F. Supp. 290, 296 (S.D.N.Y. 1991) (granting summary judgment dismissing unclean hands defense asserted in connection with copyright infringement claim where record was "devoid of any facts" supporting such defense).

As evidence of egregious misconduct, Coca-Cola's alleges that "many of [POM's] health claims are not supported by any substantial scientific evidence[.]" Answer at p. 13:6-7 [Dkt. No. 70]. POM anticipates that Coca-Cola may try to rely upon the rulings in Pom Wonderful LLC v. Federal Trade Commission, 777 F.3d 478 (D.C. Cir. 2015). However, as argued in detail above, POM's advertised health claims are not directly related to the misconduct of Coca-Cola at issue here. And explained further below, Coca-Coca cannot rely upon the rulings in the FTC proceeding, which has a different evidentiary standard (lack of scientific substantiation) that Coca-Cola is not permitted to use here as private party. To survive summary judgment, Coca-Cola is required to present affirmative evidence that POM's advertising is actually false. In other words, Coca-Cola must offer evidence affirmatively disproving the truth of POM's purported health claims.

However, Coca-Cola cannot present any such evidence. (Statement of

Uncontroverted Facts ("SUF") No. 1). They have not presented any expert opinion on POM's advertising (or on the actual messages purportedly conveyed) (SUF No. 1); they have not presented any expert opinion affirmatively disputing the claimed benefits of POM (as distinguished from expert opinion on whether the studies relief upon by POM are sufficiently reliable or credible) (SUF No. 1). Nor does Coca-Cola have any evidence of harm from the alleged misleading advertising. (SUF Nos. 1 & 2); see Welch Foods, 737 F. Supp. 2d at 1113 (finding Welch did not demonstrate by clear and convincing evidence that POM's conduct was egregious where it offered no evidence that POM's alleged deception caused consumers to purchase a product that they otherwise might not have purchased). It is simply not enough to allege, as Coca-Cola does in its Answer, that the POM's health advertising claims are not "substantiated." As a matter of law, such allegations are irrelevant to this proceeding and cannot serve as the basis for an unclean hands defense.

1. As A Matter Of Law, Coca-Coca Cannot Avail Itself To A Lack Of Substantiation Theory To Prove Falsity Or Deception Under The Lanham Act

To prevail on its unclean hands defense, Coca-Cola must demonstrate by "clear and convincing" evidence, *inter alia*, that POM's alleged health-related advertising is affirmatively false or misleading and cannot merely assert that POM's health claim advertising is "not supported by any substantial scientific evidence."

The "lack of substantiation" standard, upon which Coca-Cola relies, is only available under the FTC Act (or similar statutes) and reserved exclusively for prosecuting authorities, not private litigants. Fraker, 2009 WL 5865687, at *7 (private litigant cannot allege that defendant engaged in business practices proscribed by FTC Act which creates no private right of action).

Under such a standard, the FTC (or similar government agency) weighs the sufficiency, adequacy, quality, and strength of the science supporting any particular

claim and deems the claim false and misleading if it is not sufficiently "substantiated." See, e.g., Removatron Int'l Corp., 111 F.T.C. 206, 297-99 (1988) (requiring objective product claims be supported by a "reasonable basis"); In re Thompson Med. Co., 104 F.T.C. 648 at 813 n. 37, 840 (1984) and FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839 (1984) (appended thereto); In re Pfizer Inc., 81 F.T.C. 23 (1972) (employing flexible standard to determine appropriate substantiation depending on type of claim, product, consequences of false claim, degree of reliance, cost of developing substantiation, and amount of substantiation experts in the field believe is reasonable).

A lack of substantiation, however, does not satisfy a private litigant's burden to prove with affirmative evidence that the offending party's advertising claims are literally false or misleading.[6] See, e.g., Fraker, 2009 WL 5865687, at *7; Caltex Plastics, Inc. v. Shannon Packaging Co., No. 2:13-CV-06611 RSWL, 2015 WL 3407889, at *8 (C.D. Cal. May 27, 2015) (denying plaintiff's Lanham Act claim in the absence any admissible evidence that defendant's claims were actually false); Perfumebay.com, Inc. v. eBay, Inc., 506 F.3d 1165, 1178 (9th Cir. 2007) (holding that the record must "affirmatively demonstrate" consumer deception in order to prevail on defense of unclean hands).[7]

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[6] To prove a Lanham Act violation, plaintiff must show, among other things, that "defendant made a false statement either about the plaintiff's or its own product." Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 835 n. 4 (9th Cir. 2002) (citing Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (1997). Here, "falsity" can be proved by showing that the advertisement is "literally false, either on its face or by necessary implication"; or, if not literally false, that the representation is "likely to mislead or confuse consumers," which requires proof "by extrinsic evidence" that the advertisements "tend to mislead or confuse consumers." Southland Sod Farms, 108 F.3d at 1139.

[7] See also Johnson & Johnson–Merck Consumer Pharms. Co. v. Rhone–Poulenc Rorer Pharms., Inc., 19 F.3d 125, 129 (3d Cir. 1994) ("A plaintiff must prove that the claim is false or misleading, not merely that it is unsubstantiated."); Procter &

If permitted to challenge the sufficiency, adequacy or quality of POM's scientific research supporting its health claim advertising, Coca-Cola impermissibly would shift the burden of proof under the Lanham Act to the offending party. The law forbids this. For these reasons, as a matter of law, Coca-Cola cannot assert an unclean hands defense based on the allegation that POM's "health claims are not supported by any substantial scientific evidence."

2. Coca-Cola Lacks Any Admissible Evidence To Demonstrate That POM's Health Claim Advertising Is Literally False Or Misleading Under The Lanham Act

In order to raise a triable issue of fact on the subject of whether POM's alleged health claims are literally false or misleading, Coca-Cola is required, among other things, to present evidence affirmatively disproving POM's alleged health benefit claims. Coca-Cola, however, has never made a timely (and proper) expert disclosure pursuant to Rule 26(a)(2)(B) to establish its unclean hands affirmative defense for which it undeniably carries the burden of proof.

At best, Coca-Cola merely has offered the expert reports of Jeffrey Blumberg on January 5, 2010[8] and November 13, 2015 ("Blumberg Reports"), disguised as

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Gamble Co. v. Chesebrough–Pond's Inc., 747 F.2d 114, 119 (2d Cir. 1984) ("each plaintiff bears the burden of showing that the challenged advertisement is false and misleading ... not merely that it is unsubstantiated by acceptable tests or other proof"); U–Haul Int'l, Inc. v. Jartran, Inc., 522 F. Supp. 1238, 1248 (D. Ariz. 1981) aff'd, 681 F.2d 1159 (9th Cir. 1982) ("Jartran did not have to prove the truth of its asserted product claims; the burden in this regard rested on U–Haul, and it could not sustain its burden of persuasion by its repeated assertions (and proof) that Jartran had done little, if any, testing of Jartran trucks or trailers, and no comparative testing of U–Haul products.")

[8] On February 2, 2010, POM filed a motion *in limine* to exclude Mr. Blumberg's testimony and to strike his report. [Dkt. No. 189]. In doing so, POM argued, among other things, that Mr. Blumberg did not honestly rebut any of Mr. Anastasi's damage-related opinions, but was instead retained to offer expert testimony, belatedly, to establish Coca-Cola's unclean hands defense. (Id.) Coca-Cola should have designated Mr. Blumberg on November 12, 2009, the date by which the parties

"rebuttals" to POM's damages expert, Joseph Anastasi. In reality, the Blumberg Reports are calculated--after the fact--to establish Coca-Cola's unclean hands defense. The Blumberg Reports are procedurally improper and should be stricken.

In any event, even if Mr. Blumberg's untimely designation and reports are permitted to stand (and they should not be), his proposed opinions still do not raise a genuine dispute of material fact affirmatively disproving POM's health claims under the Lanham Act. In his reports, Mr. Blumberg's simply criticizes the "quality" and "sufficiency" of the science POM relies upon for its health claim advertising, but he completely fails to demonstrate, either with studies of his own or other studies, that POM's claims are affirmatively false or deceptive. (SUF No. 1 & 2) In his second report, Mr. Blumberg even relies upon the FTC ruling to establish that POM lacks "sufficient scientific validation for [its] health claims." (SUF No. 1). As a matter of law, this is insufficient to meet Coca-Cola's burden anyway and irrelevant to these proceedings.

Casting aside the impermissible and flawed "rebuttal" report of Mr. Blumberg, the record remains devoid of any admissible evidence establishing that POM's challenged advertising is affirmatively false and misleading. (SUF Nos. 1 & 2). As a result, both as a matter of law and in the absence of any admissible evidence, Coca-Cola cannot assert an unclean hands affirmative defense based on POM's alleged health claims advertising.

V. COCA-COLA CANNOT RAISE A TRIABLE ISSUE IN SUPPORT OF ITS "FROM CONCENTRATE" UNCLEAN HANDS DEFENSE

A. The Issue Of Whether POM's Juice Is From Concentrate Has No Immediate Or Direct Relation To Coca-Cola's Alleged False Advertising Of Its Products' Pomegranate And Blueberry Content

Similarly, any allegation that POM's juice product is "from concentrate" is

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were obligated to make their expert disclosures under Rule 26(a)(2)(B). The Court, however, did not rule on POM's motion *in limine* prior to the grant of summary judgment and subsequent appeal.

wholly unrelated to the amount of pomegranate or blueberry juice in either of the parties' competing products. How POM manufactures its juice, whether freshly squeezed or from concentrate, has no bearing on the actual content, amount, or type of juices in dispute here. Indeed, when faced with the identical grounds for the unclean hands defense in Welch Foods, the Court found defendant's "from concentrate" argument unavailing and "***too tenuous to support an unclean hands defense***." Welch Foods, 737 F. Supp. 2d at 1111. Finally, and again, POM has not alleged that Coca-Cola failed to disclose on it advertising that the Pomegranate Blueberry Juice was from concentrate or that consumers were deceived into believing that the product was fresh squeezed and not from concentrate. See FAC [Dkt. No. 53]. For these reasons, Coca-Cola cannot pursue an unclean defense based on an irrelevant allegation that POM's products are "from concentrate."

B. Coca-Cola's Argument That POM Misleads Consumers To Believe Its Juices Are Not From "From Concentrate" Fails

Coca-Cola's argument that POM misleads consumers through its advertising to believe its juices are not from concentrate is equally unavailing because it lacks evidence of deception or actual harm. (SUF Nos. 3 & 4). Indeed, there is no issue that the "from concentrate" language is on every bottle of POM's juices. As a result, there is no evidence of fraud, unconscionability or bad faith on the part of POM which would support Coca-Cola's affirmative defense of unclean hands. Welch Foods, 737 F. Supp. 2d at 1113 (declining to find egregious conduct sufficient for unclean hands where defendant lacked clear and convincing evidence of deception and appreciable harm).

VI. APPLYING THE UNCLEAN HANDS DEFENSE WOULD CONTRAVENE SOUND PUBLIC POLICY IN FAVOR OF PROTECTING THE PUBLIC AND COMPETITORS

The unclean hands defense is a disfavored remedy and "courts are reluctant to

apply the unclean hands doctrine in all but the most egregious situations." U-Haul Int'l , 522 F. Supp. at 1255. The Court should exercise its discretion to deny an unclean hands defense where, as here, Coca-Cola cannot establish actual harm. The undisputed facts of this case establish that Coca-Cola lacks evidence of affirmative falsity or deception and cannot prove that POM's conduct harmed consumers. On these facts, it would be a travesty of justice for Coca-Cola to escape liability by way of an unclean hands defense.

Indeed, "where the law invoked by the plaintiff is really for the protection of the public, unclean hands is not a defense. That is, if the evidence shows that plaintiff is engaging in inequitable practices, but defendant is also guilty of the unfair competition charged, an injunction should be granted notwithstanding the unclean hands maxim." See TrafficSchool.com, Inc. 633 F. Supp. 2d at 1085 (quoting 6 McCarthy on Trademarks & Unfair Competition § 31:53); see also Ames Pub. Co. v. Walker-Davis Publications, Inc., 372 F. Supp. 1, 14 -15 (D.C. Pa. 1974) ("[t]o deny an injunction on the basis that plaintiffs are also blameworthy would leave two wrongs unremedied and thereby increase the injury to the public."). The Supreme Court has emphasized that the doctrine of unclean hands "does not mean that courts must always permit a defendant wrongdoer to retain the profits of his wrongdoing merely because the plaintiff himself is possible guilty of transgressing the law." Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387, 64 S.Ct. 622 (1944).

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VII. CONCLUSION

For the reasons set forth above, the Court should issue an order granting partial summary judgment against the Thirty-Fourth Affirmative Defense (Unclean Hands) set forth in Coca-Cola's Answer to the First Amended Complaint.

DATED: December 1, 2015 ROLL LAW GROUP PC

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